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NO.

IN THE

Supreme Court Of The United States

OCTOBER TERM, 1983

OHIO-SEALY MATTRESS MANUFACTURING COMPANY, et al.,
Petitioners,

v.

SEALY, INCORPORATED,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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QUESTIONS PRESENTED

1. Under what circumstances does a Court of Appeals have jurisdiction over an appeal from a District Court's refusal to compel arbitration?

(Discussed *infra*, pp. 3-5)

2. To what extent, if any, should the *Enelow-Ettelson* doctrine be modified so as to implement the strong federal policy in favor of arbitration?

(Discussed *infra*, pp. 5-6)

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OHIO-SEALY MATTRESS
MANUFACTURING COMPANY, et al.,
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v.

SEALY, INCORPORATED,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

Petitioners Ohio-Sealy Mattress Manufacturing Company and its subsidiaries[1] pray that a writ of certiorari issue to review a judgment of the United States Court of Appeals for the Seventh Circuit.[2]

OPINIONS BELOW

The opinion of the Court of Appeals for the Seventh Circuit is set forth commencing at page A-1 of the Appendix hereto. The

[1]Petitioners' statements pursuant to Supreme Court Rules 21.1(b) and 28.1 are set forth in the Appendix hereto at page A20.

[2]This petition is related to the Petition for a Writ of Certiorari filed on September 30, 1983 in *Ohio-Sealy Mattress Manufacturing Company* v. *Sealy, Inc.*, No. 83-547. Both petitions address questions concerning Sections 3 and 4 of the Federal Arbitration Act and the appeals were argued together before the same Seventh Circuit panel. A motion to consolidate the two petitions is being filed contemporaneously with this petition.

Memorandum Opinion and Order of the United States District Court for the Northern District of Illinois dated September 15, 1982 is reported at 548 F. Supp. 75, and is set forth at page A-7 of the Appendix hereto. The Magistrate's Report and Recommendation on Plaintiffs' Second Motion to Compel Arbitration is set forth at page A-13 of the Appendix hereto.

JURISDICTION

The judgment of the United States Court of Appeals for the Seventh Circuit was entered on August 11, 1983. This petition for certiorari was filed within 90 days of that date. This Court has jurisdiction to review the judgment by writ of certiorari under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

Section 4 of the Federal Arbitration Act, 9 U.S.C. § 4, states in pertinent part:

> A party aggrieved by the alleged failure, neglect, or refusal of another to arbitrate under a written agreement for arbitration may petition any United States district court which, save for such agreement, would have jurisdiction under Title 28, in a civil action or in admiralty of the subject matter of a suit arising out of the controversy between the parties, for an order directing that such arbitration proceed in the manner provided for in such agreement. . . . The court shall hear the parties, and upon being satisfied that the making of the agreement for arbitration or the failure to comply therewith is not in issue, the court *shall* make an order directing the parties to proceed to arbitration in accordance with the terms of the agreement. (Emphasis supplied.)

STATEMENT OF THE CASE

Petitioners are trademark licensees of Respondent. For more than twenty-five years Petitioners have been at odds with Respon-

dent regarding Petitioners' desire to engage in competition with other Sealy plants, including those owned by Respondent. For more than twelve years Petitioners and Respondent have been arguing all of their antitrust differences in the courts and some (but not all) of their contractual differences in arbitrations.[3] Four arbitrations have been concluded during this period but none of the six antitrust suits has been completely resolved.

This particular antitrust suit was filed in July, 1979. About a year later a related contractual dispute arose concerning the interpretation of the "exclusive manufacturing territories" provision of the Sealy license agreement. Petitioners sought to arbitrate those contractual issues pursuant to a provision of that license agreement which states that "any controversy arising in connection with this agreement" shall be settled by arbitration.

Notwithstanding this express arbitration provision, Respondent refused to arbitrate. In May, 1980, Petitioners moved to compel arbitration, but a magistrate recommended that Petitioners' motion be denied. Two years later, in September, 1982, the District Court rejected Petitioners' objections to the magistrate's recommendations. Petitioners appealed the denial of arbitration but the Seventh Circuit dismissed the appeal on jurisdictional grounds.

REASONS FOR GRANTING THE WRIT

1. A Court Of Appeals Should Have Jurisdiction Over A District Court's Refusal To Compel Arbitration When Such A Refusal Will Delay Arbitration Indefinitely.

[3]For a general history of the antitrust litigation, see *Ohio-Sealy Mattress Mfg. Co.* v. *Sealy, Inc.*, 669 F.2d 490 (7th Cir.), *cert. denied*, 103 S. Ct. 257 (1982); *Ohio-Sealy Mattress Mfg. Co.* v. *Kaplan*, 90 F.R.D. 11 (N.D. Ill. 1980); and *Ohio-Sealy Mattress Mfg. Co.* v. *Duncan*, 486 F. Supp. 1047 (N.D. Ill. 1980).

Petitioners offered the Court of Appeals five bases for jurisdiction: 28 U.S.C. § 1292(a)(1); 28 U.S.C. § 1291; *Cohen* v. *Beneficial Industrial Loan*, 337 U.S. 541 (1949); the All Writs Act, 28 U.S.C. § 1651(a); and Petitioners' interpretation of the *Enelow-Ettelson* doctrine. *Enelow* v. *New York Life Insurance Co.*, 293 U.S. 379 (1935); *Ettelson* v. *Metropolitan Life Insurance Co.*, 317 U.S. 188 (1942). The Court of Appeals dismissed the appeal based upon its interpretation of the *Enelow-Ettelson* doctrine. As applied by the Seventh Circuit, the *Enelow-Ettelson* doctrine permits the appeal of an order refusing to compel arbitration if and only if that order also refused to stay proceedings in an action at law pending in the District Court (A5).

The Court of Appeals thus limited the appealability of arbitration orders to certain kinds of cases arising under Section 3 of the Federal Arbitration Act, 9 U.S.C. § 3, which provides for a stay of proceedings pending arbitration. But Section 3 is not the only tool which Congress gave the District Courts to implement the strong Congressional policy favoring arbitration of contractual disputes. Congress also enacted Section 4 of the Federal Arbitration Act, 9 U.S.C. § 4, which is manadatory in its terms: "the court *shall* make an order directing the parties to proceed to arbitration . . ." (Emphasis supplied.)

The question is whether a Court of Appeals should have jurisdiction over a District Court's refusal to compel arbitration pursuant to Section 4 of the Federal Arbitration Act where the refusal is made in the context of a single, broad civil action which includes non-arbitrable disputes. It is beyond dispute that a refusal to compel arbitration is appealable if it is made in a narrow civil action based solely on Section 4 of the Federal Arbitration Act. *Davenport* v. *Procter & Gamble Manufacturing Co.*, 241 F.2d 511, 513 (2nd Cir. 1957); *Goodall-Sanford, Inc.* v. *United Textile Workers, Local 1802*, 233 F.2d 104, 106 (1st Cir. 1956), *aff'd*, 353 U.S. 550 (1957). The same result would follow if the District Court had merely stayed a separate Section 4 arbitration

action pending resolution of a related non-arbitrable action. *Moses H. Cone Memorial Hospital* v. *Mercury Construction Corp.*, U.S. , 103 S.Ct. 927 (1983). Moreover, because Section 4 is mandatory in its terms, the Court of Appeals could have taken jurisdiction under the All Writs Act, 28 U.S.C. § 1651(a). *LaBuy* v. *Howes Leather Co.*, 352 U.S. 249 (1957). Finally, the District Court's refusal to compel arbitration was at least arguably an interlocutory order refusing an injunction, which would be appealable under 28 U.S.C. § 1292(a)(1). See *Carson* v. *American Brands, Inc.*, 450 U.S. 79 (1981).[4]

By refusing to accept jurisdiction on any of these grounds the Court of Appeals effectively gave the District Court "discretion" to subordinate Petitioners' arbitration rights to the ad hoc exigencies of a particular piece of litigation. Such a result is fundamentally inconsistent with the substantive Congressional policy expressed in the Federal Arbitration Act and with the approach taken in the Court's recent *Moses H. Cone* decision.

2. If Necessary, The Enelow-Ettelson Doctrine Should Be Modified To Permit The Appeal Of Any Failure To Enforce The Congressional Policy In Favor Of Prompt Arbitration.

If the *Enelow-Ettelson* doctrine is to be the exclusive jurisdictional basis for arbitration orders, then it should be modified so as to further rather than frustrate the Congressional policy set forth in the Arbitration Act. That policy was recently stated in *Moses H. Cone Memorial Hospital* v. *Mercury Construction Corp.*, U.S. , 103 S.Ct. 927 (1983):

> This refusal to proceed was plainly erroneous in view of Congress's clear intent, in the Arbitration Act, to move the

[4] *See*, Note, *Restraining Effects of the Final Judgment Rule on the Arbitration Process*, 66 Yale Law Journal 293 (1956) for a discussion of the impediments created by the final judgment rule and an argument favoring the immediate appeal of arbitration orders.

> parties to an arbitrable dispute out of court and into arbitration as quickly and easily as possible. The Act provides two parallel devices for enforcing an arbitration agreement: a stay of litigation in any case raising a dispute referable to arbitration, 9 U.S.C. § 3, and an affirmative order to engage in arbitration, § 4. Both of these sections call for an expeditious and summary hearing, with only restricted inquiry into factual issues.

Id. at 940.

The *Enelow-Ettelson* doctrine frustrates Congressional policy because the party seeking arbitration must wait until the entire litigation has been completed before he can obtain appellate review of the District Court's refusal to compel arbitration. See *Chapman* v. *International Ladies Garment Workers Union*, 401 F.2d 626 (4th Cir. 1968). The *Enelow-Ettelson* doctrine should be reexamined to determine whether it satisfies the current needs of this litigious society and its overburdened courts.

CONCLUSION

Petitioners have been deprived of their valuable substantive right to arbitration because of a doctrine which produces grotesque results. The Court should take this opportunity to declare that all arbitration orders which fail to enforce the Congressional policy in favor of prompt arbitration are immediately appealable.

This petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX

In the

United States Court of Appeals

For the Seventh Circuit

No. 82-2681

OHIO-SEALY MATTRESS MANUFACTURING CO., *et al.*,

Plaintiffs-Appellants,

v.

LOUIS C. DUNCAN, *et al.*,

Defendants-Appellees.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.
No. 79 C 2741—**Marvin E. Aspen,** *Judge.*

ARGUED MARCH 28, 1983—DECIDED AUGUST 11, 1983

Before CUMMINGS, *Chief Judge,* BAUER and COFFEY, *Circuit Judges.*

BAUER, *Circuit Judge.* The issue in this case is whether this court has jurisdiction to hear an appeal from an interlocutory order denying a motion to compel arbitration. We hold that it does not.

Ohio-Sealy Mattress Manufacturing Company (Ohio-Sealy) filed this action in 1979 against Sealy, Inc. alleging that Sealy's attempts to prevent Ohio-Sealy from expanding its West Coast business violated federal antitrust laws and the parties' license

agreement. Ohio-Sealy then filed a motion to compel arbitration of the contractual claims. Two months later Ohio-Sealy renewed this motion. The matter was referred to a magistrate who recommended that the motion be denied. Shortly thereafter Ohio-Sealy moved for a preliminary injunction to restrain Sealy from terminating Ohio-Sealy's license if Ohio-Sealy manufactured Sealy-label bedding at its newly acquired San Diego plant. Ohio-Sealy's final motion on these issues, entitled Motion for Preliminary Injunction, requested that Sealy be: (1) required to allow Ohio-Sealy to manufacture Sealy mattresses at its San Diego plant; (2) restrained from controlling its subsidiary, Sealy Mattress Company of the Northwest; and (3) compelled to arbitrate. The district court refused to compel arbitration or require Sealy to permit Ohio-Sealy to manufacture bedding in California. The matter concerning Sealy Mattress Company of the Northwest was referred to a magistrate for an evidentiary hearing.

Only the refusal to compel arbitration is challenged in this appeal. Sealy contends that this court has no jurisdiction over this appeal because the order denying Ohio-Sealy's motion to compel arbitration is not a final order under 28 U.S.C. § 1291, is not an interlocutory order within the meaning of 28 U.S.C. § 1292(a)(1), and was not certified for appeal under FED. R. CIV. P. 54(b).

In contrast, Ohio-Sealy asserts jurisdiction under several theories. First, Ohio-Sealy contends that the denial is a final order because it completely eliminates Ohio-Sealy's right to arbitration. It asserts that jurisdiction exists under 28 U.S.C. § 1291 because "if the district court's denial of arbitration is not reviewed now, it will never be reviewed." Appellants' reply br. at 10. In the alternative, Ohio-Sealy contends that the denial is appealable under 28 U.S.C. § 1292(a)(1) because it has the practical effect of denying an injunction. Ohio-Sealy also argues that

jurisdiction exists under the *Enelow-Ettelson* rule[1] and the collateral order doctrine. Finally, Ohio-Sealy maintains that this court has jurisdiction under the All Writs Act, 28 U.S.C. § 1651(a).

We first consider whether the order is final for purposes of 28 U.S.C. § 1291. Under section 1291 only final judgments may be appealed. A final judgment is one which ends the litigation on the merits, leaving nothing for the court to do but execute the judgment. *Dilly v. S.S. Kresge,* 606 F.2d 62 (3d Cir. 1979). If an order is a provisional disposition of an issue, which does not result in the irretrievable loss of the litigant's rights, the order is not appealable under section 1291. *United States v. Mellon Bank N.A.,* 545 F.2d 869 (2d Cir. 1976). Thus, although the final judgment rule has been construed liberally, and is subject to judicially-created as well as statutory exceptions, it is nevertheless the general rule in federal practice. 9 J. MOORE, B. WARD & J. LUCAS, MOORE'S FEDERAL PRACTICE ¶110.08[1] at 111-12 (2d ed. 1983).

The district court's denial of Ohio-Sealy's request to arbitrate does not meet the test of a final order. The pretrial denial does not mean that Ohio-Sealy necessarily will be denied arbitration. The district court's ruling is merely a discretionary ruling that Ohio-Sealy is not likely to prevail on its claim of a right to arbitration. There is, however, nothing final in this ruling; the district court has the power to compel arbitration if, after an evidentiary hearing, it concludes that the initial denial was erroneous.

Moreover, even if the denial is deemed to be a final judgment of the arbitration issue, it is not appealable because it is only one of

[1]This rule was first enunciated in *Enelow v. New York Life Insurance Co.,* 293 U.S. 379 (1935), which was decided before the merger of law and equity. The *Enelow* holding that certain orders that grant or deny jury trial or determine the method or timing of trial are appealable interlocutory orders was extended in *Ettelson v. Metropolitan Life Insurance Co.,* 317 U.S. 188 (1942), to situations arising after the federal rules of civil procedure completely merged law and equity.

many claims alleged in the complaint. The final disposition of one claim in a multi-count complaint is not final within the meaning of section 1291 unless the district court certifies it for direct appeal under FED. R. CIV. P. 54(b). *University Life Insurance Company of America v. Unimarc Ltd.*, 699 F.2d 846 (7th Cir. 1983). No such certification was granted here.

Next, we consider whether the denial of Ohio-Sealy's motion to compel arbitration qualifies as an appealable interlocutory order under 28 U.S.C. § 1292(a)(1). Ohio-Sealy combined its final motion to compel arbitration with other requests for injunctive relief. Simply casting a motion to compel arbitration in injunctive terms, however, is insufficient to bring the motion within the scope of section 1292(a)(1). *Gould v. Control Laser Corp.*, 650 F.2d 617, 621 n.7 (5th Cir. 1981). Moreover, even if the denial of Ohio-Sealy's motion has the same effect as the denial of an injunction, this fact, without more, does not render the order an appealable interlocutory order. The litigant also must establish that the interlocutory order is likely to have "serious, perhaps irreparable" consequences which can be "effectively challenged" only by immediate appeal. *Carson v. American Brands, Inc.*, 450 U.S. 79, 84 (1980).

In general, orders related only to pretrial procedures are not appealable under 28 U.S.C. § 1292(a)(1). *Switzerland Ass'n v. E. Horne's Market, Inc.*, 385 U.S. 23 (1966); *Whyte v. THinc Consulting Group International*, 659 F.2d 817 (7th Cir. 1981). The effect of the order in this case was merely to determine in which forum the claims would be heard. Thus, because Ohio-Sealy has failed to establish that the denial is likely to have "serious, perhaps irreparable" consequences as required in *Carson v. American Brands, Inc.*, 450 U.S. 79 (1980), this order is non-appealable at this stage in the litigation.

Under the *Enelow-Ettelson* exception, however, a ruling on the method or timing of trial may, under limited circumstances, be

construed as an appealable order within the language of 28 U.S.C. § 1292(a)(1). The *Enelow-Ettelson* exception obtains if: (1) the challenged order is one staying or refusing to stay proceedings in the district court; (2) the action in which the order is made is, by its nature, an action at law; and (3) the stay was sought to permit the prior determination of some equitable defense. *Jackson Brewing Co. v. Clarke*, 303 F.2d 844, 845 (5th Cir.), *cert. denied*, 371 U.S. 891 (1962). *Accord Whyte v. THinc Consulting Group International*, 659 F.2d 817 (7th Cir. 1981) quoting 9 J. MOORE, B. WARD & J. LUCAS, MOORE'S FEDERAL PRACTICE ¶110.20 [4.-1] (2d ed. 1981).

The *Enelow-Ettelson* exception does not apply because the order is not one staying or refusing to stay proceedings in the district court. Accordingly, this is not an appropriate case for invoking the *Enelow-Ettelson* exception. See *University Life Insurance Company of America v. Unimarc Ltd.*, 699 F.2d 846 (7th Cir. 1983); *Whyte v. THinc Consulting Group International*, 659 F.2d 817 (7th Cir. 1981).

Similarly, the collateral order doctrine has no application here. Under this doctrine, first enunciated in *Cohen v. Beneficial Industrial Loan Corp.*, 337 U.S. 541 (1949) four requirements must be satisfied before the collateral order doctrine is triggered to render an interlocutory decision final for the purposes of appeal. The challenged order must: (1) present an important and unsettled question of law; (2) operate to preclude effective review after final judgment of the entire action; (3) deal with a matter separate from the main cause of action; and (4) involve great danger of injustice which outweighs the policy against piecemeal review. *First Wisconsin Mortgage Trust v. First Wisconsin Corp.*, 571 F.2d 390 (7th Cir. 1978), *aff'd en banc* on this issue, 584 F.2d 201 (7th Cir. 1978).

None of these criteria has been satisfied; therefore, the collateral order doctrine does not confer this court with jurisdiction.

We also reject Ohio-Sealy's argument that this court should exercise discretionary jurisdiction under the All Writs Act, 28 U.S.C. § 1651. Ohio-Sealy argues that it is necessary to invoke the All Writs Act to untangle a situation which has been unnecessarily complicated by the denial of arbitration. We cannot agree. The authority to override the congressional policy against piecemeal appeals should be exercised only in exceptional circumstances demanding drastic remedy. *Will v. United States*, 389 U.S. 90 (1967). Mindful of the *Will* Court's admonition that "[c]ourts faced with petitions for the peremptory writs must be careful lest they suffer themselves to be misled by labels such as 'abuse of discretion' and 'want of power' into interlocutory review of nonappealable orders on the mere ground that they may be erroneous," *Will v. United States*, 389 U.S. at 98 n.6, we do not believe this is an appropriate case in which to exercise discretionary jurisdiction.

Finally, while we agree with Ohio-Sealy that arbitration can benefit both the parties and the public by avoiding the enormous social costs of litigation, we also note that although

> [a]rbitration is often thought of as a quick and efficient method for determining controversies . . . cases involving arbitration clauses sometimes are best remembered as monuments to delay because of the litigation and appeals antecedent to the actual arbitration.

Standard Chlorine of Delaware, Inc. v. Leonard, 384 F.2d 304, 305 (2d Cir. 1967). We decline to add to the delay in this case by exercising discretionary authority to hear this appeal.

Accordingly, the appeal is dismissed for want of jurisdiction.

DISMISSED.

A true Copy:
Teste:

Clerk of the United States Court of Appeals for the Seventh Circuit

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

OHIO-SEALY MATTRESS MANUFACTURING CO., *et al.*, *Plaintiffs*, v. LOUIS C. DUNCAN, *et al.*, *Defendants.*	NO. 79 C 2741

MEMORANDUM OPINION AND ORDER

MARVIN E. ASPEN, *District Judge:*

This matter is presently before the Court on the motion of plaintiff Ohio-Sealy Mattress Manufacturing Company ("Ohio-Sealy") for a preliminary injunction that would: (1) mandate that defendant Sealy, Inc. ("Sealy") allow Ohio-Sealy to manufacture Sealy-label mattresses at Ohio-Sealy's San Diego plant, (2) compel Sealy to arbitrate certain controversies that have arisen under its license agreement with Ohio-Sealy concerning a licensee's manufacture of Sealy bedding outside its area of primary responsibility, and (3) restrain Sealy from "controlling" Sealy Mattress Company of the Northwest (formerly Sealy Mattress Company of Oregon) allegedly in violation of the hold separate order previously entered in this case. *See Ohio-Sealy Mattress Manufacturing Co. v. Duncan*, 486 F.Supp. 1047 (N.D. Ill. 1980). For the reasons set forth below, Ohio-Sealy's motion for an order which, effectively, would grant it a license to manufacture Sealy-label mattresses in San Diego will be denied as will its request to compel arbitration of the related contractual issues. The Court will, however, refer the matter of Sealy's compliance with the hold separate order to a special master to be appointed by the Court or, in the alternative, to Magistrate Sussman for a hearing and a report and recommendation on the merits.

The San Diego Matter

For the past two years, Ohio-Sealy has been attempting to manufacture Sealy mattresses in San Diego, and its contention that Sealy has unlawfully prevented it from effectively competing on the West Coast by denying its request to manufacture Sealy bedding in San Diego forms a large part of this antitrust action. In fact, in November, 1980, Ohio-Sealy initially sought a preliminary injunction restraining Sealy from terminating Ohio-Sealy's license, as Sealy had threatened to do, if Ohio made good on its threat to manufacture Sealy-label mattresses in San Diego. That motion was taken under advisement during the succeeding months in which most matters in this case were held in abeyance while the parties and the Court devoted their full attentions to the earlier filed 1976 action also pending on our calendar. The renewed sense of urgency with respect to the San Diego matter apparently arises from Sealy's recent filing of a lawsuit in the United States District Court for the Central District of California charging several retailers and a retail sales representative with trademark infringement and unfair competition as a result of their sales of products manufactured by Ohio-Sealy, presumably at its San Diego plant, that are alleged to infringe on the Sealy mark.

It is within the discretion of the Court to grant a motion for preliminary injunctive relief when the moving party satisfies its burden of persuasion as to each of the following preprequisites: (1) the existence of an inadequate remedy at law and irreparable injury should an injunction not issue; (2) the threat of harm to the movant which outweighs the harm to the opposing party that would result from an injunction; (3) at least a reasonable likelihood that the moving party will prevail on the merits; and (4) the public interest will not be disserved by the granting of the requested relief. *Ohio-Sealy Mattress Manufacturing Company v. Duncan*, 486 F.Supp. 1047, 1052 (N.D. Ill. 1980). In the context of the instant case, the Court concludes that Ohio-Sealy has not

shown that it would be irreparably injured in the absence of injunctive relief permitting it to manufacture Sealy-label bedding in San Diego nor that the balance of hardships weigh in its favor should an injunction not issue at this stage of the proceedings.

In sharp contrast to the usual situation in which preliminary injunctive relief is commonly sought, Ohio-Sealy does not seek to freeze the status quo in San Diego pending adjudication of its claims on the merits. Rather, it seeks a mandatory order that would displace the current state of affairs and place it in the position it would occupy should it ultimately prevail on the merits of its antitrust and contract claims. As the Seventh Circuit has stated, while there may be situations that justify the issuance of a mandatory injunction compelling a defendant to take affirmative action, "[m]andatory preliminary writs are ordinarily cautiously viewed and sparingly issued." *Jordan v. Wolke*, 593 F.2d 772, 774 (7th Cir. 1978). Thus, mandatory preliminary injunctions have been held to be improper where the purpose of the relief sought was to effect the very change in the parties' relationship that was the objective of the lawsuit itself, *i.e.*, to "place one party in a new position which it is seeking to make permanent through the litigation." *Barbys Frosted Foods, Inc. v. McDonald's Corporation*, 1973-2 Trade Cases (CCH) ¶ 74,622 at 94,745 (D.N.J. 1973). *See also SCM Corporation v. Xerox Corporation*, 507 F.2d 358, 361 (2d Cir. 1974); *Warner Brothers Pictures, Inc. v. Gittone*, 110 F.2d 292, 293 (3d Cir. 1940); *Royal Crown Bottling Co. v. Royal Crown Cola Co.*, 358 F.Supp. 290, 294 and 297 (D. Colo. 1973).

Moreover, the potential availability of treble damages in an antitrust case such as the one at bar has often been cited as an important factor weighing against a finding of irreparable injury and the inadequacy of legal remedies in the context of a motion for a preliminary injunction, particularly where the plaintiff has not shown an inability to finance the litigation should an injunction not issue. *Rittmiller v. Blex Oil, Inc.*, 624 F.2d 857, 861 (8th

Cir. 1980); *Jack Kahn Music Co., Inc. v. Baldwin Piano & Organ Company*, 604 F.2d 755, 759 and 763 (2d Cir. 1979); *Fox Valley Harvestore, Inc. v. A. O. Smith Harvestore Products, Inc.*, 545 F.2d 1096 (7th Cir. 1976); *Milsen Company v. Southland Corporation*, 454 F.2d 363 (7th Cir. 1971). As amply reflected by the lengthy record in this and other cases to which Ohio-Sealy is a party pending in this Court and before the Seventh Circuit, the absence of injunctive relief at this stage of the proceedings will not materially hamper Ohio-Sealy's ability to continue this litigation.

Finally, although Ohio-Sealy contends that it would suffer irreparable injury by the loss of good will and customers, present and future, without the immediate grant of a preliminary injunction, it actually would seem to be Sealy and its subsidiaries, not Ohio-Sealy, that would suffer such injury if an injunction issued at this time. Ohio-Sealy is already selling some products in the San Diego/Southern California areas, albeit not as efficiently as it might if it had the capacity to manufacture Sealy bedding in San Diego, and its good will and existing customers would not seem to be affected in any negative way by our denial of injunctive relief. By contrast, Sealy and its Southern California subsidiaries would be adversely affected by the grant of the injunctive relief sought by Ohio-Sealy.

Accordingly, Ohio-Sealy's motion for a preliminary injunction requiring that Sealy allow it to manufacture Sealy-label mattresses in San Diego is denied. It is so ordered.

Arbitration of Issues Set Forth in
Ohio-Sealy's Second Motion To Compel Arbitration

On October 21, 1980, Magistrate John W. Cooley, who was previously assigned to this case, issued his report and recommendation on Ohio-Sealy's second motion to compel arbitration of certain issues regarding its desire to manufacture Sealy mattresses outside its areas of primary responsibility. Magistrate

Cooley recommended that arbitration of such issues be denied because the contractual disputes raised by Ohio-Sealy were inextricably intertwined with its nonarbitrable antitrust claims and because arbitration at this stage would only serve to further entangle this drawn-out litigation "possibly to the degree of Gordian complexity." Magistrate's Report and Recommendation at 7 (October 21, 1980). Ohio-Sealy's objections to the Magistrate's report and recommendation were filed in a timely manner and taken under advisement by this Court. That aspect of the pending motion for a preliminary injunction that seeks an order compelling arbitration is properly viewed as a request for ruling on Ohio-Sealy's previously filed objections.

The Court has reviewed the Magistrate's report and recommendation on the arbitration issue as well as Ohio-Sealy's position in favor of arbitration and developments in this case since the Magistrate issued his report and recommendation. In our view, the Magistrate's rationale for denying Ohio-Sealy's motion to compel arbitration was correct at the time he issued his report and recommendation and remains correct at this stage in the proceedings for the reasons set forth therein. The antitrust issues raised by Ohio-Sealy with respect to the San Diego matter, which are the subject of a pending motion for summary judgment, so permeate discussion of the contractual issues as to render arbitration inappropriate at this juncture. *Applied Digital Technology, Inc. v. Continental Casualty Co.*, 576 F.2d 116 (7th Cir. 1978). Moreover, arbitration on these issues at this late date would unnecessarily complicate an already complex case and divert the parties' attentions from more pressing matters in this and the earlier-filed 1976 case.

Accordingly, the Court adopts in full the Magistrate's report and recommendation on Ohio-Sealy's second motion to compel arbitration (dated October 21, 1980). The motion to compel is denied. It is so ordered.

Sealy's Compliance with the Hold Separate Order

That portion of Ohio-Sealy's motion for a preliminary injunction which seeks an order "preventing Sealy, Inc. from exercising control over Sealy of the Northwest" and Ohio-Sealy's previously filed motion for a rule to show cause why Sealy should not be held in contempt of the hold separate order raise some questions with respect to Sealy's compliance with the hold separate order previously entered in this matter, *Ohio-Sealy Mattress Manufacturing Co. v. Duncan, supra*, 486 F.Supp. at 1061, particularly with respect to whether that order prohibits Sealy from exercising "control" over its former Portland licensee and whether Sealy is in fact exercising such control. Ohio-Sealy also urges that the Court "re-evaluate" whether the hold separate order still remains a "realistic option" designed, in part, to prevent any irreparable injury to its interests. In the Court's view, an evidentiary hearing is necessary to fully develop the facts and the parties' positions in this regard.

Accordingly, this matter will be referred to a special master to be appointed by the Court with approval by the parties for a hearing and a report and recommendation on the merits with respect to Ohio-Sealy's concerns over Sealy's compliance with the hold separate order and its contention that the order may no longer be a "realistic option" by which its interests may be protected. In the event that the naming of a special master for this specific purpose cannot be agreed upon by the parties, Magistrate Sussman will be designated to conduct this hearing. Counsel for Ohio-Sealy and Sealy shall advise the Court as to their views on the foregoing within seven days in order that a hearing officer may be designated as soon as possible and in order that said hearing officer may schedule a prompt hearing on this matter. It is so ordered.

/s/ MARVIN E. ASPEN

MARVIN E. ASPEN
United States District Judge

Dated: 9/15/82

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

OHIO-SEALY MATTRESS MANUFACTURING CO., *et al.*,

Plaintiffs,

v.

LOUIS C. DUNCAN, *et al.*,

Defendants.

NO. 79 C 2741

MAGISTRATE'S REPORT AND RECOMMENDATION ON PLAINTIFFS' SECOND MOTION TO COMPEL ARBITRATION

Plaintiffs have moved for entry of an order compelling Sealy, Inc. ("Sealy") to arbitrate seven issues[1] in accordance with the arbitration provision of the license agreement which governs the relationship between the parties. Sealy has responded and plaintiffs have replied. Oral argument has been waived. For the reasons stated *infra*, it is recommended that plaintiffs' second motion to compel arbitration be denied.

1. *Contentions of the Parties*

Plaintiffs seek to have this court compel Sealy to arbitrate seven issues,[2] purportedly arising under the license agreement to which they are parties. Those issues are:

1. Was Sealy, Inc.'s failure to respond to Ohio-Sealy's February 6, 1980 request for data until July 3, 1980 permissible under the license agreement?

[1]The instant motion is the second of two motions filed by plaintiffs in this action seeking to compel arbitration. The first motion sought to compel arbitration of three issues. That motion is the subject of a separate Report and Recommendation issued contemporaneously with the instant Report and Recommendation.

[2]These issues apparently have as their genesis, a February 6, 1980 letter of Ernest Wuliger, president of Ohio-Sealy directed to Howard

(Footnote continued on next page.)

2. Does Sealy, Inc. have a duty under the license agreement to provide the data requested in Ohio-Sealy's February 6, 1980 letter?

3. Does Sealy, Inc. have a duty to decide what data is necessary for a presentation to the board of directors as described in Ohio-Sealy's February 6, 1980 letter?

4. Do Ohio-Sealy's existing license agreements permit Ohio-Sealy to manufacture Sealy mattresses outside its existing APRs under any circumstances?

5. Does Article II of the present license agreement require Sealy, Inc.'s board of directors to consider each request by Ohio-Sealy to manufacture Sealy mattresses at "another location" within the territory of one of Sealy, Inc.'s owned and operated mattress plants?

6. Does Article II of the present license agreement require Sealy, Inc.'s board of directors to consider requests by Ohio-Sealy to manufacture Sealy mattresses at locations in the territories of other Sealy licensees (e.g. St. Louis)?

7. Are the foregoing matters arbitrable under the license agreement?

Conceding that the antitrust issues involved in this case are non-arbitrable (*e.g. Applied Digital Technology, Inc.* v. *Continental Casualty Co.*, 576 F.2d 116, 119 n. 4 (7th Cir. 1978)), plaintiffs argue that the seven issues set forth *supra* are strictly contractual and therefore severable, and arbitrable under Article XVI of the license agreement.[3] Plaintiffs further argue that speedy disposition

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Haas, president of Sealy, in which letter Wuliger stated his interest in pioneering one or more Sealy plants in Salt Lake, Spokane, San Diego, Pocatello and requested the data necessary for Ohio-Sealy to make a presentation to Sealy's board of directors.

[3] That article provides:

> Except for controversies arising under Section IV or Section VI, in each of which cases a decision by the requisite majority of the Board of Directors shall be final and determinative, any con-

(Footnote continued on next page.)

of these contractual issues[4] by arbitration will simplify this litigation by reducing the issues remaining for judicial decision. Both arbitration and this judicial action, they argue, may proceed simultaneously.

Sealy, on the other hand contends: (1) the court does not have jurisdiction to grant plaintiffs' motion because the matters as to which plaintiffs' motion seeks to compel arbitration do not concern any "issue involved in [this] suit or proceeding," within the requirements of 9 U.S.C. § 3; (2) the questions raised present no "controversy" within the meaning of the Arbitration Act nor within the meaning of the license agreement itself; (3) the questions as to which plaintiffs seek to compel arbitration are "patently baseless and frivolous" and are thus of a type which federal courts have repeatedly recognized should not be ordered to arbitration; (4) the fourth and sixth questions are hypothetical, abstract, and not related to any identifiable controversy between the parties; (5) the fifth question is moot because after plaintiffs filed the instant motion, Sealy's board considered Ohio-Sealy's request for permission to manufacture Sealy bedding in San Diego and denied the request with stated reasons; (6) the first three ques-

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troversy arising in connection with this Agreement shall be settled by arbitration.

Plaintiffs contend that the seven issues itemized *supra* in text do not arise under Sections IV or VI. Rather, they argue, those issues "relate to Ohio-Sealy's desire to manufacture Sealy brand bedding in San Diego, California, under Article II of the License Agreement." *See* Plaintiffs' Memorandum in Support of Plaintiffs' Second Motion to Compel Arbitration, p. 2. Article II appears as Exhibit A to Memorandum of Defendant Sealy, Inc. in Opposition to Plaintiffs' Second Motion to Compel Arbitration. The "location clause" (Article II) has figured in plaintiffs' previous lawsuit against Sealy and is presently the subject of proposals pending before Judge Parsons in the equitable relief proceedings.

[4]Anticipating a possible contention of Sealy, plaintiffs maintain that even if it can be argued that the seven "issues" do not constitute "controversies," the interpretation of the word "controversy" in the arbitration clause (*see* note 3, *supra*) is, itself, a proper subject for arbitration.

tions were never presented to Sealy as proposed subjects of arbitration, but, in any event, for the reason stated in contention (5), immediately *supra*, they are moot.

In reply, plaintiffs argue: (1) the issues to be arbitrated are "part of this action," but even if they were not, the court would have jurisdiction to grant the instant motion; (2) the questions plaintiffs seek to arbitrate are not abstract thus necessitating an advisory opinion, but rather they are questions of interpretation of the license agreement; (3) the interpretation of the word "controversy" in the arbitration clause, is, itself, a proper matter for arbitration; (4) even the issue as to whether the questions plaintiffs have proposed for arbitration are "frivolous or patently baseless" is a matter for arbitration; (5) arguments that plaintiffs' issues are "hypothetical" should be addressed to the arbitrator and not to the court; (6) if Sealy has never refused to arbitrate the first three issues, then the court should compel arbitration of them.

2. *Analysis*

Unquestionably, plaintiffs have advanced strong arguments favoring arbitration of the seven issues and Sealy has responded with cogent arguments of virtually equal force and persuasiveness. If this were a normal piece of litigation, plaintiffs would, on balance, prevail on their motion as to the arbitrability of most, if not all, of their seven proposed issues.[5] However, no one could dare

[5]I agree with Sealy that arbitration is not a procedure for adjudicating questions that are trivial, abstract, moot, hypothetical, frivolous, or patently baseless. On the other hand, I agree with plaintiffs that it is generally the arbitrator's duty, and not the court's, to classify particular issues, as appropriate, under those categories. Likewise, whether the matter proposed for arbitration is a "controversy," within the meaning of the arbitration clause, lies within the arbitrator's bailiwick for decision. Contrary to Sealy's position, I do not consider that Article II and IV of the licensee agreement, in themselves, so clearly prohibit a licensee from manufacturing Sealy products outside the licensee's designated APR. Thus, at least as to that issue, the court has jurisdiction under 9 U.S.C.

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argue that this is a normal piece of litigation. The issue now before the court is not so much the technical propriety under the Arbitration Act or under the arbitration clause of the license agreement of compelling arbitration of the seven issues, but rather it is one of how best to manage a highly complex configuration of parties and claims so that the ends of justice can best be served. In essence, the issue is one of judicial administration. To grant plaintiffs' motion as to the seven issues or controversies, which plaintiffs indeed concede are "part of this action,"[6] would

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§§ 3 and 4 to compel arbitration. That this issue is a "controversy" under the Arbitration Act and the licensee agreement is buttressed by the fact that Mr. Haas' July 28, 1980 letter to Mr. Wuliger regarding Ohio-Sealy's request to locate an out-of-APR plant in San Diego made no reference to any prohibition in Article II, IV, or the license agreement, in general. If there is a general prohibition, as Sealy now contends, the unanswered question is why did the Sealy board of directors give substantive consideration to Ohio-Sealy's request.

[6]At page 2 of their Reply in Support of Second Motion to Compel Arbitration, plaintiffs state in part:

> The issues for which arbitration is sought relate to whether Ohio-Sealy has a right under the license agreement to manufacture Sealy brand bedding in San Diego, *a question which is a part of this case.* Paragraph 13(b) of the complaint, for example, alleges that defendants have utilized the provisions of Sealy license agreement to prevent Ohio-Sealy from competing in the mattress business except in the markets and territories permitted by defendants. *In order to determine whether this allegation is true with respect to San Diego,* it must *first* be determined what the license agreement permits Ohio-Sealy to do in San Diego.

(Emphasis added). This argument, in my view, is an admission that the antitrust claims permeate the contractual claims or that they are sufficiently interdependent so as to render arbitration of the contractual claims improper. *See Applied Digital Technology, Inc.* v. *Continental Casualty Co.*, 576 F.2d 116 (7th Cir. 1978).

It should also be noted that plaintiffs have consistently argued that the San Diego matter is "necessarily a part of this lawsuit," in part because of "Judge Aspen's res judicata ruling." *See* Plaintiffs' Memorandum in Opposition to New Board Member Defendants' Motion for a Protective Order, filed September 9, 1980 at pp. 1 and 8.

serve to further entangle this litigation, possibly to the degree of Gordian complexity.[7]

To deny this motion would be well within the district court's discretion,[8] and would serve to reaffirm and to maximize the court's management role in litigation whose course, if left to the parties' arbitrational whims, will be uncharted and unending.[9] *See Midwest Window Systems, Inc.* v. *Amcor Industries, Inc.*, No. 80-1067 (7th Cir. September 19, 1980); Magistrate's Report

[7]Practical considerations dictate heavily against shunting any "part of this action" off to arbitration. First of all, for a substantial period of time the parties would predictably be distracted from their primary goal of aggressively preparing the instant case for trial (or, alternatively, pursuing settlement). Moreover, arbitration of these (and other issues which plaintiffs might propose in the future) might delay, intolerably, the filing of a final pretrial order in this case. For months, perhaps years, neither the court nor the parties, would be able to state definitively what issues would remain for judicial determination. Also, there is the additional problem of possible overreaching by an arbitrator into matters which may impact adversely on other trial issues and which may later prove to be more appropriately within the court's (or jury's) domain. Plaintiffs' quotation of a 1974 arbitrator's decision (at page 7 of their reply memo) provides a clear example of the "issue dilemma" which is likely to confront an arbitrator and which may spawn "issue overreach."

[8]In *Applied Digital Technology, Inc.* v. *Continental Casualty Co.*, 576 F.2d 116, 119 (1978), the Seventh Circuit noted that the district court has broad discretion in its ruling on the issue of compelling arbitration and that its decision is reviewable on an "abuse of discretion" standard. In *Applied Digital*, where a permeation issue was involved, the Seventh Circuit refused to disturb the district court's decision enjoining arbitration even where the panel was "of the opinion that the degree of permeation . . . [was] not overwhelming and that . . . [it] was a close case. . . ." *Id.*

[9]Plaintiffs of course may seek leave, if necessary, to amend their Complaint to incorporate one or more of the issues which are the subject of the instant motion to compel. Whether such amendment is appropriate, in light of the totality of the circumstances of this case (including circumstances described in this magistrate's soon to be issued Report and Recommendation on Defendants' Motion for a Protective Order Excluding Frederic F. Brace, Jr. From Access to Confidential Information) is a matter for careful consideration by the district court if or when a motion for leave to amend the Complaint is presented.

and Recommendation on Plaintiffs' First Motion to Compel Arbitration, footnote 7.

For the foregoing reasons, and for additional reasons stated in the contemporaneously issued Report and Recommendation on Plaintiffs' First Motion to Compel Arbitration, at pp. 11-13,

IT IS RECOMMENDED that Plaintiffs' Second Motion to Compel Arbitration be DENIED.

Respectfully submitted,

/s/ JOHN W. COOLEY

JOHN W. COOLEY
United States Magistrate

Dated: 10-21-80